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IN THE

# Supreme Court of the United States

October Term, 1970
No. 1623

FRANKLIN E. TODD,
*Petitioner,*

v.

NORTHWEST AIRLINES, INC.,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent respectfully states that review on Writ of Certiorari should be denied in this matter as petitioner cannot show facts which would justify this court granting such an extraordinary writ. The record shows that the Court of Appeals for the Ninth Circuit acted within its jurisdiction and proceeded in accordance with the essential requirements of the law affirming and adopting the decision of United States District Court for the Western District of Washington, Northern Division.

## COUNTERSTATEMENT OF FACTS

For the reason that respondent feels there are inaccuracies and omissions in the statement contained in the petition, respondent will restate facts pertinent to this petition.

Frank Todd was employed as a flight engineer for Northwest Airlines, Inc. On or about February 28, 1964, Todd was discharged by Northwest Airlines for the stated reasons that (1) Todd had served as a crew member on a flight having used alcoholic beverages during the 24-hour period immediately preceding the departure time and (2) he influenced and encouraged the first pilot and other crew members to fly at a time when he knew of the physical deficiency of the first pilot assigned to the flight. Under the collective bargaining agreement between Northwest Airlines, Inc., and the International Association of Machinists (IAM) which represented the flight engineers employed by Northwest, grievance procedure provided for empaneling a System Board of Adjustment to decide disputes such as existed between Todd, the discharged employee, and Northwest Airlines. This System Board was established in accordance with the provisions of the Railway Labor Act, 45 U.S.C.A. §184. The Railway Labor Act provides that such awards are enforceable against a carrier by the District Courts.

> "Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, . . . *Provided, however,* That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order." 45 U.S.C.A. §153, First, (p).

If an employee or group of employees is aggrieved by an award of the Systems Board, a petition for review may be filed in the District Court.

> "The Court shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28." 45 U.S.C.A. §153, First, (q).

The System Board of Adjustment empaneled to hear Todd's grievance was composed of three members, one selected by IAM (the union), one selected by Northwest Airlines (the company), and a neutral selected by the other two members, pursuant to the terms of the collective bargaining agreement.

The union assigned an official, Arthur Pedersen, to prosecute Todd's grievance at the hearing. Todd wished to be represented by his own counsel as Todd had earlier been expelled from the union on a charge of dual unionism, and Pedersen had represented the union in the proceeding in bringing such charges against Todd. Accordingly, an agreement was made, acceptable to the members of the System Board, between Todd, Mr. Schumacher, Todd's personal attorney, and Pedersen. The agreement was that (1) Pedersen retained the right of representation as to any contractual application under the flight engineer's agreement, (2) Schumacher would conduct the entire presentation on Todd's behalf, calling and interrogating witnesses and (3) Todd freely and fully agreed to be

bound by the decision of the System Board [District Court's Memorandum Opinion, Petition A-15]. The System Board proceeding was conducted in accordance with this agreement.

After a three-day hearing, the System Board rendered its decision. The majority of the Board, consisting of the neutral and the representative of the company, disallowed the first charge brought by the company but upheld Todd's discharge on finding that there was sufficient evidence to substantiate the charge that

> "He influenced and encouraged the first pilot and other crew members to fly Flight No. 27 of January 1, 1964, at a time when he had good reason to believe the first pilot should not take out the flight in the interest of the public's safety."

The System Board member representing IAM, Howard P. Ramaley, concurred with the majority as to disallowance of the first charge but dissented from the majority on their finding as to the second charge.

Todd then began an action in the United States District Court for the Western District of Washington, Northern Division, to set aside the order of the System Board and for contract damages on account of wrongful discharge. On motion for summary judgment brought by both parties, the court reviewed the decision of the System Board in accordance with the jurisdiction given by 45 U.S.C.A., §153 First (q) [Petition, A-10].

The district court extensively examined and reviewed exhibits and briefs submitted by both parties and, finding that the award of the System Board of Adjustment was neither arbitrary nor capricious or void for fraud, granted summary judgment for the defendant.

## ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In *Gunther v. San Diego & Ariz. E.R. Co.*, 382 U.S. 257, 15 L.Ed.2d 308, 86 S. Ct. 368 (1965), this court discussed the Congressional policy both in establishing and giving finality to decisions of System Adjustment Boards empaneled to hear "minor" grievances. Such boards, composed equally of representatives of management and labor, are peculiarly familiar with and knowledgeable in settling the daily grievances that constantly exist in the transportation industry. The benefit both to the aggrieved employee and the industry of having these competent and readily available forums would be lost if finality were not granted to a decision of such board. In affirmance of the very limited judicial review granted by the *Gunther* decision, the statute governing the finality of such board decisions was subsequently amended by Congress. The Congressional committee report indicates that Congress, in amending the statute, intended judicial review to be limited, and it was not intended that a decision of a board would be upset merely because the court disagreed with such award. 1966 U.S. Code Congressional and Administrative News, page 2287.

The Fifth Circuit has recently stated:

> "It is the voluntary act of the employee which gives the actions of the System Board such final authority. Upon his discharge, an employee has a choice—he may sue in court for a breach of contract of employment, or he can proceed under the agreement and the Railway Labor Act before the Board. He may not do both. Hence, 'granted jurisdiction in the Board, its decisions on either factual or legal or mixed issues, are not reviewable in court.' *Woolley v. Eastern Airlines, supra.*" *Rosen v. Eastern Air Lines, Inc.*, (C.A.

Fla. 1968) 400 F.2d 462, cert. denied 89 S.Ct. 1307, 394 U.S. 959, 22 L.Ed.2d 560, rehearing denied 89 S.Ct. 1741, 395 U.S. 917, 23 L.Ed.2d 232.

An award of an airline System Board of Adjustment was held final and conclusive in *Thorgeirsson v. Trans World Airlines, Inc.*, (D.C.N.Y. 1968) 288 F. Supp. 71. In so holding, the court said:

> "The extent to which this Court may review the award of the Flight Engineers' Board is narrowly circumscribed. . . . Moreover, the Railway Labor Act requires the District Court to accept the System Adjustment Board's determination of the merits of a grievance (citations omitted). The determination by the Flight Engineers' Board that Thorgeirsson retained his seniority as a flight engineer and was entitled to reinstatement is final and conclusive; the Court cannot redetermine the issue."

This court has consistently denied issuance of a Writ of Certiorari where the record failed to disclose that the lower court erred in exercising its jurisdiction under 45 U.S.C.A. §153 First (p) or (q). *Northwest Airlines, Inc. v. Airline Pilots Ass'n. Intern.*, (C.A. Minn. 1967) 373 F.2d 136, Certiorari denied 88 S.Ct. 77, 389 U.S. 827, 19 L.Ed.2d 83; *Brotherhood of R.R. Trainmen v. Denver & R.G.W.R. Co.*, (C.A. Colo. 1966) 370 F.2d 833, Certiorari denied 87 S.Ct. 1375, 386 U.S. 1018, 18 L.Ed.2d 456; *Howard v. St. Louis-S.F. Ry. Co.*, (C.A. Mo. 1966) 361 F.2d 905, Certiorari denied 87 S.Ct. 598, 385 U.S. 986, 17 L.Ed. 2d 448. The decision of the Court of Appeals for the Ninth Circuit now before this court on petition is entirely consistent with these decisions rendered in other circuits as well as this court's decision in *Gunther, supra.*

Petitioner's claim that there was "lack of fair representation because of hostility between the grievant and his

union representative" is wholly without merit. Petitioner at no time in this litigation has charged that there was hostility between himself and the System Board member appointed by IAM, Mr. Ramaley. Mr. Ramaley voted for Todd and against Northwest Airlines on both charges. One wonders what more he could have done on Todd's behalf. Even if Todd had hostile feelings towards Pedersen because of the dual unionism charge, Todd was in no way denied fair representation because of any act of Pedersen. (The record fails to disclose any reciprocity of feelings by Pedersen.) Pedersen voluntarily, pursuant to the agreement with Todd and his counsel, limited his participation in the board hearing to presenting the contractual rights of flight engineers employed by Northwest Airlines. The record of the hearing shows that Todd's grievance was thoroughly and vigorously advocated by Mr. Schumacher, his personal attorney.

The situation present in the Todd hearing was entirely dissimilar from that examined by the court in *Edwards v. Capital Airlines*, 176 F.2d 755 (C.A.D.C. 1949). In *Edwards*, the real dispute was between the grievant and the union which represented the majority of the pilots. The court found that

> "And in the case before us, the union did take a position in favor of the majority of the employees. In fact, it assumed a burden of presenting and pressing the claims of that majority."

The union position in the Todd hearing was not similarly bifurcated. As the trial court stated,

> "Here the union would and apparently did have a definite interest in seeing to it that no precedent was set allowing flight engineers to be fired in circum-

stances such as plaintiff contended existed." (Petition, A-13)

This court's decision in *Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 21 L.Ed.2d 301, 89 S.Ct. 337 (1968), does not present grounds for granting the petition for certiorari. There was no "bias or appearance of bias" by members of the System Board of Adjustment which heard the Todd grievance. In *Coatings, supra*, six members of this court held that where the neutral on an arbitration board had an undisclosed financial relationship with the adverse party, such member had breached standards of fairness and impartiality. Even if the *Coatings* rule should be applicable to a System Board of Adjustment, petitioner has made no allegations that Walter Gray, the neutral, had a financial relationship with the adverse party or was in any way biased.

The decision of the Court of Appeals noted that

> "Another System Board disciplined pilot Rall and co-pilot Lee, but did not order their discharge. That award was left undisturbed by *Northwest Airlines, Inc. v. ALPA, Rall and Lee*, 373 F.2d 136 (8th Cir.) Cert. den. 389 U.S. 827."

While the discipline initially imposed upon all these employees by Northwest Airlines was the same, the fact that the Rall and Lee System Board modified Northwest Airlines' action does not render the decision of the Todd System Board inconsistent, much less invalid. The trial court thoroughly considered and evaluated the results of the separate System Board hearings.

> "However, the two proceedings were separate proceedings, and the evidence was not exactly the same in each. Nor is it certain that the witnesses which seemed most credible in the Todd case were just as

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believable in the second proceedinith the presump-
the two cases are fully consistent wnsidered the evi-
tion that the board in each case coade its ruling in
dence before it in the case, and mPetition, A-19)
accordance with that evidence." (1

## CONCLUSION

The record clearly shows that this court should deny the petition for certiorari. The Court of Appeals for the Ninth Circuit has acted properly and in accordance with the laws of the land and the applicable precedents established by this court. Its decision based on the District Court's well-reasoned memorandum opinion is consistent with decisions rendered in other courts of appeal on the same matter.

Respectfully submitted,

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